Public Consultation on Civil Justice Reforms

Recommendations of the Civil Justice Review Committee and Civil Justice Commission

26 October 2018

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I. CIVIL JUSTICE REVIEW COMMITTEE AND CIVIL JUSTICE COMMISSION

1. Singapore's civil justice system is highly regarded and works very well for the large majority of users and stakeholders. However, there is a need to continue reviewing and improving the system to ensure that the costs and time needed to resolve a civil dispute are proportionate to the value of the claim, and there is effective and efficient enforcement of judgments.

2. To this end, the following two announcements were made:

   i. On 5 January 2015, the Chief Justice announced the establishment of the Civil Justice Commission (CJC) with the following terms of reference:

      a. To transform, not merely reform, the litigation process by modernising it, enhancing efficiency and speed of adjudication and maintaining costs at reasonable levels.

      b. To simplify rules, avoid outdated language without discarding established legal concepts, eliminate time-consuming or cost-wasting procedural steps, ensure fairness to all litigants, make good use of advancements in information technology and allow greater judicial control of the entire litigation process.

      c. Such other aspects as the Chief Justice may direct from time to time.

      The CJC also recognised the need to ensure that the Rules of Court ("Rules") provide flexibility for the court to do right for each individual case, and ensure that parties will not be denied justice because of accidental procedural flaws

   ii. On 18 May 2016, the Ministry of Law announced the establishment of the Civil Justice Review Committee (CJRC). The CJRC was tasked to make recommendations relating to:

      a. Enhancing judicial control over litigation, civil procedure;
      b. Professional training requirements and public education measures to support the recommendations; and
      c. A review mechanism to assess the implementation of the CJRC's recommendations two years post-implementation.

3. Over the past few years, the CJRC and CJC have engaged in wide-ranging and comprehensive discussions. Their reports (attached at **Annex B and C**

respectively) represent the culmination of their work. The CJC also proposed a set of new Rules which are attached to the CJC report. This public consultation paper represents a consolidation of the recommendations by the CJRC and CJC.

4. Please note that this public consultation paper is not intended to be an interpretative paper in that it is not to be used to interpret or define the new Rules.

5. Further, the concepts discussed in this public consultation paper are still at the discussion stage and may change after further discussion and reflection.

II. INVITATION TO GIVE FEEDBACK

6. You are invited to share with us your views and comments on the recommendations by the CJRC and CJC.

7. Respondents are requested to observe these guidelines:

   a. Indicate your name and the organisation you represent (if applicable) as well as contact details (email address and / or telephone number) to enable us to follow up and seek clarification, if necessary;
   b. Focus your comments on how the recommendations can be improved or whether the changes are necessary; and
   c. State clearly which specific recommendation you are giving feedback on by referring to the relevant paragraph in this public consultation paper.

8. Please send all comments and feedback by 30 November 2018 via post or email to:

Legal Policy Division
Ministry of Law
100 High Street
#08-02 The Treasury
Singapore 179434
Email: MLAW_Consultation@mlaw.gov.sg

9. Only comments and feedback that are received no later than 30 November 2018 will be considered. We seek your kind understanding on this.

III. EXECUTIVE SUMMARY

10. The key to these recommendations is for the court to do right in each case and not be shackled by the letter of the law. The recommendations seek to enhance judicial involvement in civil proceedings to ensure that disputes are resolved efficiently and at a reasonable cost. In addition, the majority of cases should follow a default track, this being a single streamlined procedure, with flexibility for modifications when the case requires or where parties agree.

11. A duty will be imposed on a party to any proceeding to consider amicable resolution of the dispute. This ensures that parties give sufficient consideration to resolving their disputes amicably before commencing or during the course of their action. The court will be empowered to order parties to attend ADR.

12. When an action is commenced, the court will take control instead of leaving parties to determine the pace and intensity of the proceedings. The trial judge and registrar will be given the autonomy and flexibility to manage their cases during Case Conferences. The Chief Justice may direct that certain rules do not apply or are modified for a particular category of cases. Case management tools such as the List of Issues and Case Note are introduced so that parties can narrow and crystallise the issues in dispute as well as set out their positions and arguments on disputed issues.

13. The court will determine the number of applications that parties can file and when parties can file them. The court will order each party to file a single application as far as possible. In particular, the hope is to eliminate the prevalent practice of seeking to amend pleadings very close to the commencement of trial or even on the first day of trial, resulting in wastage of trial time and possibly resulting in adjournment of the trial. In general, no application can be taken out within 14 days of commencement of trial or during trial.

14. In appropriate cases, affidavits of evidence-in-chief ("AEICs") may be ordered before any exchange of documents so as to shift the focus of witness evidence to the case put forward through pleadings, so as to avoid the possibility that witness evidence may be tailored to match disclosed documents.

15. Production of documents, which takes up a disproportionate amount of time, energy and costs, will be reformed such that the general position is for parties to produce the documents upon which they rely for their respective cases, and request specific documents from the other party where necessary. While this discovery regime is applicable by default, parties may agree to broaden the scope of discovery and the Court may also allow a broader scope of discovery when it is in the interests of justice to do so.

16. Where expert evidence is necessary, the general position will be for a common expert to be used. The court may allow parties to use their own experts in a special case. An alternative suggestion is that parties will be given the option to appoint their own expert witnesses if all parties so agree.

17. When a case comes to trial, there will be increased judicial involvement so that judges can take greater control of the conduct of trial and avoid excessive time and costs being expended on lengthy trials.

18. In terms of the framework of legal costs, the CJC has proposed a system of scale costs. This system re-emphasises the principle that, all things being equal, solicitor-and-client costs ("S&C costs") should be equal to party-and-party costs ("P&P costs"). The intended result is that a successful litigant who conducts his case reasonably throughout should recover all his litigation costs. That said, parties can make an informed choice whether to depart from the scale costs.

19. Details of these recommendations, as well as other recommendations of the CJRC and CJC, are set out in the following sections.

IV. THE RECOMMENDATIONS

A. GENERAL MATTERS (CJC)

20. The CJC proposes that the Chief Justice be empowered to determine the extent to which the Rules apply to certain categories of cases. For instance, certain rules may be dis-applied by the Chief Justice for smaller value claims so as to speed up the process and to reduce costs.

21. Parties and the court will be guided by the following ideals in conducting civil proceedings:

    a. Fair access to justice;
    b. Expeditious proceedings;
    c. Cost-effective work proportionate to the nature and importance of the action, the complexity of the claim as well as the difficult or novelty of the issues and questions it raises, and the amount or value of the claim;
    d. Efficient use of court resources; and
    e. Fair and practical results suited to the needs of parties.

22. The court will be empowered to do what is right and necessary on the facts of the case before it to ensure that justice is done, provided it is not prohibited from so acting by any written law and its actions are consistent with the ideals.

23. Where there is non-compliance with the Rules which is not waived by the court, the court will be empowered to refuse to hear the matter or even dismiss it without a hearing. The court may dismiss, stay or set aside any proceedings and also give the appropriate judgment or order. This deviates from the norm today that non-compliance with the Rules could be compensated by costs. The court will also be empowered to impose a late-filing fee for each day of non-compliance to dis-incentivise persistent non-compliance.

24. The Rules will oust the application of the Interpretation Act and provide that a non-court day (i.e. Saturday, Sunday or public holiday) will be included in the calculation of time for a period that is 7 days or more.

25. The Rules relating to the parties' ability to extend time by consent will be modified such that parties may only extend time without an order of court once, by mutual consent in writing, and for a maximum period of 7 days.

26. Applications to the court should be made by way of summons supported by affidavit but the court will also be given the flexibility to allow any application to be made orally or by letter.

27. Forms will be simplified to make them more accessible, informative and user-friendly.

B. PARTIES TO PROCEEDINGS AND CAUSES OF ACTION (CJC)

28. The CJC proposes that existing provisions relating to the procedural rules on standing, certain causes of action, as well as the appointment, change and discharge of solicitors will be simplified and consolidated.

29. The proposed Rules will set out the following:

a. Who can be parties in proceedings in their own names;
b. Parties that must be represented by litigation representatives;
c. Parties that must be represented by solicitors;
d. Estate actions, actions against deceased persons and bankrupts, as well as class actions;
e. Permitting the court to make a declaratory judgment or order even when no other relief is sought; and
f. Appointment, change and discharge of solicitors. The process will be simplified such that letters could be used instead of having to file court documents.

C. AMICABLE RESOLUTION OF CASES

30. (CJC) Parties will have to give sufficient consideration to resolving their disputes amicably before commencing or during the course of their action. In this regard, a duty should be imposed on a party to any proceeding to consider amicable resolution of the dispute before commencing any action or appeal. The party will have to make an offer of amicable resolution (being an offer to settle or an offer to resolve the dispute other than by litigation) unless he has reasonable grounds not to do so. The offeree shall not reject the offer unless he has reasonable grounds to do so.

31. (CJRC) Alternative dispute resolution (ADR) will be conducted by a third party, namely:

    a. A private mediator or neutral evaluator (e.g., from the Singapore Mediation Centre); or

    b. An in-house court mediator or neutral evaluator who may be a High Court or a District Court judge who is not the trial judge allocated to the case. Such in-house ADR sessions may be provided to parties at a low cost or free-of-charge if feasible, bearing in mind the significant judicial resources likely required for implementation.

32. (CJRC & CJC) If the court is of the view that the duty to consider amicable resolution has not been discharged properly, the court will be empowered to order parties to attend ADR. Notwithstanding this power, the judge will, as far as possible, encourage parties to attend ADR by consent.

33. (CJRC & CJC) To discourage unreasonable refusals to attempt ADR or reach an amicable resolution of the matter, there will be more robust use of cost sanctions which take into account parties' conduct in relation to any attempt at resolving the matter by ADR. For example, there could be adverse costs orders against a successful party who has not discharged his duty to consider amicable resolution.

34. (CJC) Where parties are making an offer to settle, the proposed Rules will set out how to make and accept an offer of amicable resolution, the reasonableness of its terms and when the fact of not accepting such an offer can be relied upon and made known to the court. The procedural rules on offers to settle have also been simplified to remove unnecessary technicalities.

35. An offer without any expiry date will not run indefinitely. Instead, such an open offer will expire once the court determines the merits of the action unless the offeror states otherwise. Without this provision, an offeree whose case is dismissed by the court could technically accept the open offer immediately even if he has been unreasonable in not accepting it earlier.

D. COMMENCEMENT OF PROCEEDINGS

36. (CJC) There will be two modes of commencing an action in court. They will be known as Originating Claim and Originating Application.

37. A party who commences an action will be known as the claimant and the party who is sued will be known as the defendant. Instead of entering an appearance in respect of an Originating Claim, a defendant must file and serve a notice of intention to contest or not to contest.

38. The current duration of the validity of originating processes for service will be modified from 6 months (or 12 months for service out of Singapore) to 3 months. The court's ability to extend the validity of originating processes for service indefinitely will also be modified to 2 extensions of 3 months each, except in a special case. The general rule therefore is that an originating process is valid for service for a maximum of 9 months.

39. These modifications seek to push claimants to take reasonable steps to effect service expeditiously and to give the court greater control over cases which are not progressing because the defendant has not been served.

40. A claimant's ability to file a generally endorsed Originating Claim merely to preserve his position and leverage on having filed an action in court will be restricted. As such, an Originating Claim has to be endorsed with a statement of claim unless the limitation period for the cause of action will expire within 14 days after the Originating Claim is issued.

41. To ensure that cases do not hibernate after commencement, a claimant must take reasonable steps to serve on the defendant as soon as possible and, in any event, within:

    a. 14 days after the Originating Claim is issued if it is to be served in Singapore;
    b. 28 days after the Originating Claim is issued if it is to be served out of Singapore.

42. Instead of entering an appearance within 8 days after service of the writ (or 21 days for a writ served out of Singapore) under the existing Rules, a defendant is required to file a notice of intention to contest or not to contest within 7 days (21 days for an Originating Claim served out of Singapore) after the statement of claim is served on the defendant. Such a notice will allow the claimant to know whether he should prepare for battle or whether the defendant has surrendered.

43. Failure to file a notice of intention to contest or not to contest may result in default judgment against the defendant.

44. A defendant must file and serve a defence to the Originating Claim:

    a. Within 21 days after the statement of claim is served on the defendant in Singapore. This is because, while a claimant has time to prepare his case before commencing action, the defendant may not know that someone is suing him until he is served with the originating process;
    b. Within 5 weeks after the statement of claim is served on the defendant out of Singapore. This is consistent with the time given for a defendant who is served out of Singapore to file and serve a defence to an Originating Application.

45. If the defendant is challenging the jurisdiction of the court, he may file and serve a bare defence, stating the ground of challenge on jurisdiction.

46. There shall be no pleadings beyond the defence or the defence to counterclaim unless the court otherwise orders. This is to cut down on pleadings that do not add anything material.

47. (CJRC) Separately, forms for pleadings for common types of claims such as personal injury will be introduced and encouraged, but not made mandatory. Today, pleadings are often either inadequate or prolix. Inadequate pleadings prevent the parties and the court from establishing the key issues until a much later stage while prolix pleadings result in wasted time and costs. These problems are exacerbated in cases involving litigants-in-person who do not know which facts are relevant, and which facts should or should not be adduced in pleadings.

48. The object of the forms is to provide more guidance, particularly for litigants-in-person, to facilitate the preparation of adequate pleadings.

E. SERVICE IN AND OUT OF SINGAPORE (CJC)

49. The CJC proposes that existing Rules in relation to service in and out of Singapore should be simplified and consolidated.

50. Under the existing Rules for service in Singapore, a document is deemed served on a particular day if it is served on that day before midnight. However, for the purposes of computing any period of time after service of that document, it shall be deemed to have been served on a particular working day only if it is served on that day before 4pm.

51. This confusing formula will be removed. Instead, if service is effected before 5pm on any particular day, service is deemed to have been effected on that day. If service is effected after 5pm on any particular day, service is deemed to have been effected on the following day.

52. As for the Rules relating to service out of Singapore with court's approval, the proposed Rules prescribe the criteria for obtaining the court's approval for service out of Singapore namely, showing that the court has the jurisdiction or is the appropriate court to hear the case.

53. This makes it unnecessary for a claimant to scrutinise the long list of permissible cases set out in the existing Rules in the hope of fitting into one or more descriptions. It also avoids the possibility that a particular category of cases which could and should be heard in Singapore is actually not in the list.

54. Instead of imposing an obligation on the Ministry of Foreign Affairs and the court to send an originating process or other court documents to various agencies to effect service out of Singapore under the existing Rules, the proposed Rules simply require the serving party to engage a solicitor to do so directly unless that is not allowed.

55. The solicitor will become the point of contact for the serving authority or person in the foreign country and rightly so as he is best placed to respond to any queries from the foreign country.

F. CASE CONFERENCE

56. The Case Conference (or Case Management Conference) will be the command centre for all matters relating to case management, and sets the timelines and tone of proceedings.

57. Currently, trial judges are only involved in a case at a fairly advanced stage of the proceedings. As a result, inadequacies in the pleadings, documents, or witness evidence are only unearthed during trial.

58. (CJRC & CJC) To minimise the problems above, a judge and/or relevant judicial officer will manage the case throughout its life cycle once the claim is filed.

59. (CJRC) During the Case Conferences, court will give case management directions which can include:

a. Disclosure of documents;
b. Filing of interlocutory applications;
c. Number of factual witnesses;
d. Number of expert witnesses, if necessary;
e. Necessity and scope of evidence to be adduced from factual and/or expert witnesses;
f. Exchange of AEICs;
g. Submission of the Case Note; and
h. Trial dates and length of trial.

60. There are two possible proposals for when the first Case Conference should be scheduled. (CJC) A Case Conference will be held 8 weeks after an originating process is issued if the defendant is to be served in Singapore or 12 weeks if the defendant is to be out of Singapore.

61. (CJRC) Alternatively, the Case Conference could be scheduled at four fixed points after pleadings have been filed, namely:

i. After pleadings have been filed;
ii. At the stage of interlocutory applications;
iii. Exchange of evidence; and
iv. Close to trial.

62. Aside from the four milestone Case Conferences described above, Case Conferences can be convened as and when necessary bearing in mind the fact that multiple Case Conferences may be counter-productive and escalate costs. Parties can communicate with the court via correspondence as well which would reduce the need for Case Conferences to be scheduled.

63. (CJRC) The intention behind both proposed timelines is that the Case Conference should be fixed early in the proceedings so that the court can take control of proceedings right after an action is commenced.

64. (CJRC) The Case Conferences should be attended by the lead counsel, or a counsel who is familiar with the case and has sufficient authority to make decisions. Otherwise the court may stand down or adjourn the Case Conference until a counsel who has sufficient knowledge or authority is present.

i. List of issues (CJRC)

65. The CJRC proposes that parties should file a List of Issues ("LOI") prior to the first Case Conference. The LOI will be a neutral case management tool which identifies the principal issues in dispute in a structured manner, and enables the court and parties to determine matters such as the scope of disclosure of documents, as well as the scope of factual and expert evidence which should be adduced.

66. The judge should work with parties in formulating the LOI during Case Conferences, and reviewing and refining it as the case progresses. Where both parties are unrepresented, and thus unable to prepare the working draft LOI, the judge may work with parties to draft the LOI during the Case Conference itself.

ii. Exchange of AEICs

67. (CJC) The court may direct parties to file and serve their list of witnesses and to file and serve AEICs of all or some of the witnesses after pleadings have been filed and served but before any exchange of documents. (CJRC) Parties may file supplementary AEICs following disclosure of documents, but only with leave of court.

68. (CJRC) Filing and exchanging AEICs before disclosure of documents may not be easily done if counsel and parties continue to prepare cases the way it is done today. Specifically:

a. Parties will have to interview witnesses before disclosure to prepare the AEICs and repeat the process after disclosure, resulting in additional costs.

b. Parties may face difficulties identifying witnesses in the early stages of the proceedings.

c. In simpler claims where the disclosure process is straightforward, additional costs may be incurred in filing AEICs before disclosure which

are not proportionate to the costs saved from a reduced scope of disclosure.

d. Parties may try to game the system by filing a bare AEIC at the outset, only to file a more substantive supplemental AEIC closer to trial (after discovery has taken place). Parties may also make more applications for leave to file supplemental AEICs.

69. (CJRC) The purpose of filing and exchanging AEICs before disclosure is to shift the focus of witness evidence to the case put forward through pleadings, so as to avoid the possibility that witness evidence may be tailored to match disclosed documents. Therefore, for the proposal for AEICs to be filed and exchanged before discovery to be effective, parties and their counsel will have to engage in more thorough preparation of witness evidence at an early stage of proceedings. While this may frontload the costs incurred to prepare witness evidence, it will result in greater time and costs savings in the long run.

70. The court will not exercise its powers to order AEICs to be filed and exchanged before disclosure of documents if parties are unable to prepare their AEICs without the disclosure of documents. This is especially so for cases where there is asymmetry of information.

iii. Single interlocutory application (CJC)

71. The CJC proposes that, other than excepted classes of applications, the court will control the number of and the period within which interlocutory applications may be filed by determining the applications which are required and order each party to file a single application as far as possible. Applications set out in the single application can be filed as of right. However, no further application may be taken out at any time without the court's approval.

72. Parties will not be able to take out any application within 14 days before trial except in a special case and with the trial judge's approval. This helps to eliminate strategic ambush near trial and avoids wasting court hearing time on matters that should have been dealt with much earlier.

iv. Case Note (CJRC)

73. The CJRC proposes that parties will be required to submit a Case Note to the court at the pre-trial stage, preferably before directions on evidence are given. This Case Note will replace the Lead Counsel's Statement. The Case Note will briefly set out parties' positions, arguments on disputed issues, and establish areas that are not in dispute. The Case Note is not binding on parties in terms of their eventual positions. Taken together with the LOI, the Case Note will

assist the judge in identifying the factual and legal issues for adjudication, understanding each party's case, and in giving directions on evidence.

74. The requirement to file a Case Note will require parties to think about their case and arguments at an earlier stage, and allow a party sufficient preparation time to address arguments raised by the opposing party. This will ensure that both parties are able to address arguments raised during trial, thus allowing proceedings to be conducted in a timely and efficient manner.

75. An appropriate page limit for the Case Note will be imposed.

v. <u>Amendment of pleadings (CJC)</u>

76. Save for special cases, the CJC proposes that the court will not allow pleadings to be amended within 14 days before trial. The court may draw appropriate inferences if material facts in the pleadings are amended. This is to eliminate the prevalent practice of parties seeking to amend pleadings very close to the trial date or even on the first day of trial, which could result in wastage of court hearing time and possibly adjournment of trial.

vi. <u>Interrogatories (CJC)</u>

77. The CJC proposes that interrogatories under the existing Order 26 and 26A will be abolished as they have long faded in effectiveness after AEICs were introduced.

G. PRODUCTION OF DOCUMENTS

78. (CJC) The proposed Rules introduce a new discovery regime which works on the principle that a claimant is to sue and proceed on the strength of his case and not on the weakness of the defendant's case. It aims to prevent parties from engaging in unnecessary requests and applications with the hope of uncovering a "smoking gun".

79. (CJRC & CJC) The current process of general discovery followed by specific discovery has led to situations where the time and costs spent on discovery are disproportionate to the complexity and value of the claim. Thus, an arbitration-style disclosure of documents will be adopted by default in the new regime. Parties will first produce the documents upon which they rely for their respective cases. To counter the concern that the arbitration-style of discovery may enable parties to withhold documents adverse to their own case, the availability of specific discovery will enable a party to request documents (in particular, documents which are adverse to the party holding them) from the other party.

80. The court will retain a residual discretion to allow a broader scope of discovery on application by any party if it is satisfied that it is in the interests of justice. It will be in the interests of justice to allow such broader scope of discovery where it could aid in disposing fairly of the proceedings.

81. (CJRC) While the arbitration-style discovery regime will be applicable by default, parties may agree to broaden the scope of discovery. This will provide flexibility to well-resourced and sophisticated parties in high-value commercial disputes.

82. (CJC) The court is also given the power to order any party or non-party to produce a copy of any document in his possession or control.

83. The production of any "train of inquiry" document or a document that is part of a party's private or internal correspondence is prohibited except in a special case. "Special case" is deliberately left undefined to allow for flexibility and good sense should a rare case emerge.

84. The proposed Rules will codify and give effect to our Court of Appeal's decision in *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 that the mere fact that confidential information had been made technically available to the public at large does not destroy its confidential character.

85. The proposed Rules also modify the High Court's decision in *Foo Jong Long Dennis v Ang Yee Lim & anor* [2015] 2 SLR 578 such that the party who discloses or owns the document may apply to the court for the implied undertaking to continue even though the *Riddick* principle ceases to apply once a document is

used in open court. The *Riddick* principle provides that a party who obtains discovery may use the documents disclosed to him only for the proper purpose of conducting his own case, and there is an implied undertaking by him not to use them for any collateral or ulterior purpose.

86. Finally, the Rules will allow the court to order pre-action production of documents and information or against a non-party for the following purposes:

a. To identify possible parties to any proceedings;
b. To enable a party to trace his property; or
c. For any other lawful purpose.

H. EXPERT EVIDENCE

87. (CJC) Expert evidence can only be used in court with the court's approval. The court will only sanction the use of expert evidence if such evidence will contribute materially to the determination of any issue in the case and the issue cannot be resolved by an agreed statement of facts or by submissions based on mutually agreed materials.

88. (CJRC) There are difficulties with the current system which sees each party appointing its own expert witnesses, these being:

    a. The expert witnesses often have irreconcilable differences in opinion. Their evidence may then unnecessarily complicate the issues before the court, thus becoming counterproductive rather than helpful to the adjudicative process.
    b. Party-appointed experts are presented with the facts of the case framed according to the perspective of the party hiring them, which may influence their interpretation of the evidence.
    c. The disproportionately high costs usually incurred in the preparation and presentation of expert testimony.

89. (CJC) In light of the above difficulties, the general rule is that one common expert will be used. In a special case and with the court's approval, the parties may use their own experts but they cannot rely on expert evidence from more than one expert on all or any of the issues. The court retains the discretion to appoint a court expert in addition to or in place of the parties' common expert or all the experts. The Court will give all appropriate directions relating to the appointment of the common expert and the court expert, including the method of questioning and the remuneration to be paid. (CJRC) The single court expert will be granted access to all evidence to assist in the formulation of his expert opinion.

90. (CJRC) In determining whether to allow parties to use their own experts, the judge will take into account the following factors:

    a. Views of the parties;
    b. Cost proportionality-related issues such as the amount of money or property involved, the complexity of the expert issue(s), whether parties have already engaged their own experts; and
    c. Whether evidence from a party expert is necessary to reach a just outcome.

91. (CJC & CJRC) The parties will be required to agree on the list of issues to be referred for expert evidence and the common set of facts on which the experts are to rely. The court will approve the list of issues and the common set of facts and the expert evidence will be confined as such.

92. (CJC) The court may make various orders with respect to expert witnesses First, the court may order the parties, their solicitors and the experts to meet before, during or after the making of the expert report to try to narrow any dispute and so that parties can agree in writing on all or some of the conclusions on the issues referred to the experts. Other than the contents of any agreement in writing, the contents of discussions at such meetings shall not be used in court unless the parties otherwise agree.

93. (CJC & CJRC) Second, the court may also order that all or some of the experts testify as a panel. The court will be given flexibility as to how evidence should be given by a panel of experts. (CJC) The proposed Rules clarify that a defendant retains the right to submit a "No case to answer" when that defendant's expert testifies on such a panel before the defendant's non-expert witnesses have testified.

94. (CJRC) While the position that the court appoints an expert, if at all, will be applicable by default, parties will be given the option to appoint their own expert witnesses if all parties to the dispute agree to do so.

I. INJUNCTIONS, SEARCH ORDERS AND OTHER RELIEF (CJC)

95. The CJC proposes that the provisions governing injunctions, search orders, interim payments, receivers, sale and dealings with immovable property before trial as well as interpleaders will be simplified and consolidated.

96. The forms for injunctions and search orders currently found in the practice directions will be incorporated into the Rules and may be simplified at a later date.

J. COURT HEARINGS AND EVIDENCE

i. Court hearings

97. (CJC) The court will be allowed to conduct hearings on documents alone for certain categories of cases so that the parties or their solicitors do not need to attend court. This avoids the problem of having to arrange suitable hearing dates for the parties and the court, and obviates transport expenses and travelling time to go to and from court. It also saves on hearing hours and, in some cases, court hearing fees. It means of course that the court has to spend time outside hearing hours to read the documents and then inform the parties of its decision.

98. (CJRC) Additionally, there should be increased judicial involvement during the trial so that judges can take greater control of the conduct of the trial and avoid excessive time and costs being expended in lengthy trials.

99. (CJRC) In light of the above, the judge may exercise the following powers at any time during trial:
    a. Directly question witnesses, including on issues outside the scope of pleadings if necessary.
    b. Restrict the issues for examination of witnesses.
    c. Restrict the time for examination of witnesses.
    d. Direct the order in which any speech or evidence by a party or witness should be made or given.

100. (CJRC) Judicial impartiality remains an important feature of our civil procedure, and broad guidelines should be introduced for judges who engage in the examination of witnesses.

101. (CJRC) The courts could consider a pilot project for judge-led cross-examination in certain types of cases (e.g. family cases and Community Disputes Resolution Tribunal cases). These are cases where parties could benefit from the judge having greater control of the cross-examination of witnesses (for example, because parties are often litigants-in-person).

102. (CJC) The conditions and procedure for a defendant to make a submission of "No case to answer" are clarified and formalised.

ii. Evidence

1. Factual witnesses

103. (CJRC) Each party will be required to submit a list of proposed factual witnesses to court. The judge will be given the power (to be exercised sparingly) to call, on his own motion, a factual witness who is not in any party's list of witnesses and question that witness.

104. Currently, civil proceedings are lengthened when parties adduce unnecessary or irrelevant evidence from factual witnesses (whether written or oral) which does not assist in the fair and expeditious resolution of the dispute.

105. The objective of the proposal is thus to ensure, as far as possible, that parties call factual witnesses who are likely to provide evidence necessary and relevant to the dispute. The judge or registrar may issue directions on the following matters during the Case Conferences:

a. The number of factual witnesses;
b. The necessity and scope of evidence to be adduced from the factual witnesses; and
c. The manner in which evidence will be adduced, e.g., length of examination.

106. (CJRC & CJC) The judge may also exercise a power to call a factual witness if none of the parties intends to call a witness whose evidence, in the judge's opinion, is likely to be necessary to resolve the dispute.

107. (CJRC) This power will be exercised very sparingly. The judge should ask parties for the reasons why the witness is not called before exercising the power to call the witness on his own motion. After hearing the parties' reasons, the judge can exercise the power to call that witness on his own motion if he is still of the view that the witness' evidence is necessary to resolve the dispute.

108. If a factual witness is subpoenaed by a judge on his own motion, there are two possible proposals in relation to the questioning and costs of this witness. (CJRC) One of the proposals is that the judge will question that witness before parties may ask further questions. Parties will share the cost of a witness called by the judge on his own motion.

109. (CJC) Alternatively, the court may give directions for the cross-examination of such a witness, and may order one or more of the parties to pay for the reasonable expenses incurred by the witness.

110. (CJC) The procedure for applying for an order for a witness to attend court and for bringing to court a person who is in prison should be simplified to applications by letter to the Registrar.

2. Affidavits

111. The CJC proposes that affidavits may be affirmed before a solicitor who is a Commissioner for Oaths so long as he is not the solicitor acting for the party, even if a member of his firm is acting for that party. Rule 9 of the Commissioner for Oaths Rules which states the contrary should be deleted.

112. Affidavits filed as evidence-in-chief must bear a colour photograph of the maker of the affidavit. This will assist the trial judge in recalling what any particular witness looks like when the trial judge is considering a reserved judgment or is writing grounds of decision.

K. JUDGMENTS AND ORDERS (CJC)

113. The CJC proposes that the courts will be given the option to either hear parties or give its decision without the parties' attendance when there is a dispute on the terms of the draft order.

114. The court will also be given the discretion to redact any order in the interests of justice or where the order is made in hearings which are conducted in private under any written law. Likewise, the court will also have the discretion to prohibit any person, other than the parties, from inspecting or taking copies of any order for the same reason.

L. APPEALS

115. (CJC) The broad aims of the proposals are to:

a. Speed up appeals from applications by:
    i. Requiring the parties to file only written submissions with the appeal proceeding by way of a rehearing based on the documents filed by the parties in the Court below;
    ii. Hearing all such appeals together as the time for filing an appeal does not start to run until all matters in the single application have been disposed of;

b. Allow lower courts maximum autonomy in procedural matters with appellate intervention only if substantial injustice will be caused;

c. Move parties quickly from procedural skirmishes to the main battle on the merits of the case;

d. Save costs and reduce prolixity by requiring succinct documents to be filed with the imposition of page limits which can only be exceeded if the court approves and with the payment of a fee;

e. Draw a distinction by requiring less formality for appeals in applications and requiring more formality only for appeals on the merits after trials through the filing of Cases. The contents and format of the Cases are prescribed by the proposed Rules with court fees payable in addition to page limit fees if applicable; and

f. Make appellate hearings more effective by allowing parties to make only such oral submissions as the appellate court orders.

116. (CJRC) To reduce the number of applications for leave to appeal to the Court of Appeal, a High Court Judge and Judge of Appeal can jointly decide whether to grant the leave to appeal on the basis of written submissions without oral hearing. The decision on whether to grant leave is final and non-appealable.

M. REFORMS TO FRAMEWORK OF LEGAL COSTS

i. Scale costs

117. The CJC has the following recommendations for a fixed costs regime, under which:

i. Scale costs will generally apply for both liquidated and quantifiable claims, between party and party as well as between solicitor and client: Chapter 16, para 2 of the CJC Report.

ii. The scale costs will be set out in the Rules and may be varied from time to time by the Chief Justice. The scale of costs proposed by the CJC is set out at Chapter 16, rule 10(7) of the draft Rules of Court.

iii. S&C costs should generally be equal to P&P costs.

iv. No costs will be awarded for applications unless there is unreasonable conduct.

v. Parties will generally be awarded full costs even if they settle early or discontinue proceedings.

vi. Scale costs will apply between party and party unless parties otherwise agree or the court otherwise orders in a special case. Where parties opt out of the scale for P&P costs, they may agree on whatever they deem fit.

vii. For claims which are not liquidated or quantifiable, the court shall fix or assess costs using factors prescribed in the Rules of Court.

viii. Solicitors and clients will be able to make an informed decision whether to depart from scale costs.

ix. All costs agreements must be in writing and the solicitors are expected to explain to their clients the costs consequences if they opt out of scale costs.

x. A litigant-in-person should be allowed to recover costs which will reasonably compensate him for his time and expense reasonably incurred.

N. ENFORCEMENT OF JUDGMENTS AND ORDERS

118. (CJC) Membership in clubs and societies may be seized as part of the enforcement proceedings. Where the enforcement applicant requires multiple modes of enforcement, he can take out a single enforcement application so that he does not need to take out multiple applications for each method of enforcement.

119. (CJC) In relation to sale by public auction, a public auction will be arranged where the estimated value of the seized property is more than $20,000 as opposed to the current $2,000 limit, which is way too low in today's money value for a public auction to be cost-effective. The Sheriff may engage appropriate persons to assist him in all matters relating to the enforcement order.

120. (CJC) The Sheriff is entitled to a commission of 2% of:

a. The gross proceeds of sale of the seized properties; or
b. The estimated value of the seized properties if property is seized but not sold,

subject to a minimum amount of $100 and a maximum amount of $50,000.

121. (CJRC) Moving forward, the enforcement process for civil judgments will be privatised.

122. The tools currently available for enforcing both monetary and non-monetary judgments are limited and unsophisticated. For example, the burden of tracking the assets of the judgment debtor falls on the judgment creditor. The enforcement process is too court-centric, which may lead to disproportionate costs. Finally, there are limited modes of enforcing non-monetary judgments. All these hinder the effective enforcement of judgments.

123. Given the broad implications of privatisation, however, the Ministry of Law should study the problems and proposals in further detail, and implement the civil enforcement reforms separately from the rest of the civil justice reforms.

O. CONTEMPT OF COURT (CJC)

124. As the Rules relating to contempt of court were recently amended to give effect to the Administration of Justice (Protection) Act, the existing Rules on this matter can be largely retained with simplification of its language.

125. That said, the CJC has two additional proposals:

a. To confirm the High Court's power to order the arrest of a committal respondent who fails to attend a hearing without good reason and to bring him before the Court as soon as it is practicable; and

b. To allow the Sheriff to engage any auxiliary police officer or other security agency to assist him in the discharge of his duties.

P. PREROGATIVE ORDERS (CJC)

126. The CJC proposes that applications for prerogative orders may name the Attorney-General as the defendant if the identity of the proper defendant is unknown or uncertain. However, the Attorney-General can apply to the court to ask the applicant to amend the name of the defendant if the Attorney-General is not the right party.

127. The existing application for leave as a distinct first step in applications for prerogative orders is proposed to be abolished. In practice, solicitors for the applicant and the Attorney-General's Chambers often agree to conflate the leave stage with the merits stage because they usually have to go through the same facts and arguments anyway.

128. However, the Attorney-General has the liberty to file an affidavit on only preliminary objections or other legal issues against the application without stating the factual disputes yet. The court may hear these objections first and decide to dismiss the application for prerogative orders on the basis of the preliminary legal issues.

129. The proposed Rules incorporate the requirements in case law pronouncements on judicial review.

130. In addition, the three-month deadline, which presently applies only to Mandatory Orders, will apply to Prohibiting Orders and Quashing Orders as well. There is no justification for not imposing the same deadline on the latter two Orders as late applications for those two Orders can also hinder good public administration and prejudice actions already taken.

Q. COURT FEES, REGISTRY, ADMINISTRATION AND FINANCE (CJC)

131. The CJC proposes that court fees will be paid in the circumstances and the manner set out in the Practice Directions.

R. PROFESSIONAL TRAINING AND PUBLIC EDUCATION MEASURES (CJRC)

132. Access to justice begins with knowledge of one's legal rights and remedies.

133. The CJRC proposes that this may be achieved through public education measures to inform members of public of key features of the new civil justice framework.

134. In order to adapt to and thrive in the changing landscape of the civil justice system, both judges and lawyers will need to undergo training to ensure that they are suitably equipped with the skills and competence that will be expected of them in the years to come.

S. REVIEW MECHANISM TO ASSESS IMPLEMENTATION OF RECOMMENDATIONS (CJRC)

135. If these proposals are implemented, the CJRC proposes that the Ministry of Law should work with the courts to assess the implementation of the recommendations after two years.

136. To determine if the new procedures have indeed led to time- and cost-savings, focus group discussions can be held with judges, lawyers and litigants.

137. Data can be collected to ascertain how frequently the default positions were departed from, to assess whether parties prefer the default positions or the options for more time- and cost- intensive procedures.

138. Finally, court users (litigants, witnesses, and counsel) can be surveyed, to find out if their navigation of the civil justice system has been aided by an active judge, who gives guidance at each stage of the proceedings.

V. CONCLUSION

139. The recommendations in this public consultation paper represent the outcome of the CJRC's and CJC's work, which seek to transform the civil justice system so that the time and costs needed to resolve a dispute are proportionate to the value of the claim.

140. We would like to thank you for reading our public consultation paper and encourage you to step forward to provide your feedback and comments on the recommendations.

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